

TENNESSEE REGULATORY AUTHORITY **800NEY FILE COPY ORIGINAL**

Lynn Greer, Chairman
Sara Kyle, Director
Melvin Malone, Director



460 James Robertson Parkway
Nashville, Tennessee 37243-0505

July 10, 1998

VIA FEDERAL EXPRESS (Airbill #806985481638)

Secretary, Federal Communications Commission
1929 M Street, N.W.
Washington, DC 20554

RE: Petition for Preemption of AVR, L.P. d/b/a Hyperion
Telecommunications of Tennessee, L.P.
CC Docket No.: 98-92

Dear Secretary of the FCC:

Enclosed please find an original and thirteen (13) copies of the Tennessee Regulatory Authority's Comments in response to Hyperion's Petition for Preemption in the above referenced docket. These Comments reflect the position of a majority of the members of the Authority, and the original Order in this matter reflects both the opinion of the majority members and the dissenting opinion of the minority member. Please date stamp a copy for my files and return the same in the enclosed self-addressed envelope.

Should you have any questions, please contact me at the address and/or phone number indicated below. Thank you for your cooperation.

Sincerely,

Carla G. Fox
Senior Counsel

Enclosures

xc: Chairman Melvin Malone
Director Lynn Greer
Director Sara Kyle
Richard Collier, General Counsel

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**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

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IN THE MATTER OF:

**AVR, L.P. d/b/a
Hyperion of Tennessee, L.P.**

**Petition for Preemption of Tennessee Code
Annotated § 65-4-201(d) and Tennessee Regulatory
Authority Decision Denying Hyperion's Application
Requesting Authority to Provide Service in Tennessee
Rural LEC Service Areas**

CC Docket No. 98-92

COMMENTS IN RESPONSE TO HYPERION'S PETITION FOR PREEMPTION

This matter comes before the Federal Communications Commission upon the Petition of AVR, L.P. d/b/a Hyperion of Tennessee, L.P. for an Order preempting the April 9, 1998, Order of the Tennessee Regulatory Authority (the "TRA")¹, and, more specifically, Tenn. Code Ann. § 65-4-201(d). In response to Hyperion's Petition, the TRA would respectfully comment as follows:

I. INTRODUCTION

Section 253 of the federal Telecommunications Act of 1996, codified as 47 U.S.C. § 253 (the "Telecom Act"), provides in pertinent part:

(a) IN GENERAL.-- No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

¹ The TRA, as successor to the Tennessee Public Service Commission, was created by an act of the Tennessee General Assembly and became effective on July 1, 1996. The April 9, 1998, Order of the TRA is attached to Hyperion's Petition as Exhibit A.

(b) STATE REGULATORY AUTHORITY.-- Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

* * *

(d) PREEMPTION.-- If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

While Section 253(a) of the Telecom Act prohibits certain state legislation that restricts a competing local exchange carrier from providing intrastate telecommunications services, Section 253(b) makes clear that Section 253(a)'s limitations do not apply in every instance. In the matter of Hyperion's Petition, the TRA found that the requirements under Tenn. Code Ann. § 65-4-201(d)² were necessary to preserve universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.³ Likewise, the TRA determined such statutory requirements to be competitively neutral and consistent with section 254 of the Telecom Act. As such, the TRA acted well within the scope of Section 253(b) in entering its April 9, 1998, Order and respectfully requests that its Order be upheld.

² Hyperion's Petition at Exhibit F contains Tenn. Code Ann. § 65-4-201 in its entirety. Subsection (d) restricts competing local exchange carriers from entering certain rural areas by providing:

Subsection (c) is not applicable to areas served by an incumbent local exchange telephone company with fewer than 100,000 total access lines in this state unless such company voluntarily enters into an interconnection agreement with a competing telecommunications service provider or unless such incumbent local exchange telephone company applies for a certificate to provide telecommunications services in an area outside its service area existing on the effective date of this act.

³ Id. at 8.

II. SECTION 65-4-201(d) IS NECESSARY TO PRESERVE AND ADVANCE UNIVERSAL SERVICE, PROTECT THE PUBLIC SAFETY AND WELFARE, ENSURE THE CONTINUED QUALITY OF TELECOMMUNICATIONS SERVICES AND SAFEGUARD THE RIGHTS OF CONSUMERS WITHIN THE STATE OF TENNESSEE

As the April 9, 1998, Order pointed out, the Tennessee General Assembly stated in its Preamble to the legislation at issue in this matter that: "It is in the public interest of Tennessee consumers to permit competition in the telecommunications services market."⁴ Further the General Assembly stated that "Universally affordable basic telephone service should be preserved."⁵ Thus, Tenn. Code Ann. § 65-4-201(d) clearly has a dual purpose of fostering competition and preserving universal service. It is also clear that federal lawmakers were concerned about the preservation of universal service when they enacted the Telecom Act because the language of Section 253(b) places a tremendous burden on the Act's enforcer to ensure that universal service is not impaired.

In Tennessee, universal service could be substantially impaired if Tenn. Code Ann. § 65-4-201(d) is not upheld. Hyperion rejects this position of the TRA and argues that: "Nothing in the legislative history of § 65-4-201(d) supports the TRA's assertions that the Tennessee General Assembly enacted the statute due to universal service concerns."⁶ Hyperion is simply mistaken. The legislative history of Tennessee's Telecommunications Act makes clear that universal service was a critical factor in the enactment of Tennessee's Telecommunications Act, of which Tenn. Code Ann. § 65-4-201(d) is a part. As the legislative history attached to Hyperion's Petition as Exhibit G demonstrates, the Commissioners of the TRA's predecessor, the Tennessee Public Service Commission (the

⁴ Id. at 9 (quoting 1995 Tenn. Pub. Acts 408).

⁵ Id.

⁶ Hyperion Petition at 13.

"TPSC"), were acutely aware of the issues affecting Tennessee consumers at the time the subject state legislation was being considered. In fact, the Commissioners of the TPSC were requested to provide testimony to Tennessee lawmakers about the advancement of competition within Tennessee and the need to ensure that "lower rates" and "higher quality services" actually occur with competition.⁷ As the then Commissioner Bissell pointed out:

We haven't had the technology that would permit true competition in the local service market. I think we have that today. *It won't happen overnight and that's why we have safeguards in the legislation and in the rules that we presented to you during the evolution of competition. . . .*⁸

Senate State and Local Government Committee Consideration of Telecommunications Bills, Committee Meeting of April 18, 1995, attached to Hyperion's Petition as Exhibit G.

While it is true that the legislative testimony of Elizabeth Owen, the then Director of the Tennessee Division of Consumer Affairs, affirmed the need for competition for all sectors of Tennessee, Ms. Owen also recognized the need to ensure that competition does not get in the way of affordable telephone service. Ms. Owen pointed out that:

[T]rue competition is going to come very slowly to some of those areas [of the State] and we have to look out for the consumers there. It's going to be hard for me to explain to those consumers why their telephone bills perhaps go up in an area, in a time, rather, when we have declining cost. And that's going to be hard to explain to those consumers.

⁷ See Senate State and Local Government Committee Consideration of Telecommunications Bills, Committee Meeting of April 18, 1995 (testimony of Commissioner Keith Bissell). At least one Commissioner of the TPSC currently serves as a Director of the TRA, Director Sara Kyle. Like Commissioner Bissell, Director Kyle was also present to provide testimony and heard first hand the concerns of the state legislature on balancing competition with other relevant considerations. Director Kyle voted in favor of acknowledging Tenn. Code Ann. § 65-4-201(d) as a valid Section 253(b) requirement. See April 9, 1998, Order attached to Hyperion's Petition as Exhibit A.

⁸ See Senate State and Local Government Committee Consideration of Telecommunications Bills, Committee Meeting of April 18, 1995 (testimony of Commissioner Keith Bissell)(emphasis added).

Id. Perhaps state representative Bill Purcell said it best when he stated from the House floor, during consideration of the bill that later became law:

We restated the declaration of policy, the basic foundation upon which this bill wills [sic] stand, and that policy now stated taking language that was proposed initially by one of the wisest telecommunications lawyers in this state, a policy that says straightforwardly and in a simple way that not only a court but a citizen can understand that what we're trying to do here is foster the development of an efficient and advanced statewide system of services. And its a system that needs to remain affordable. That's the basic statement of policy. . . .

Id.

Thus, it is in consideration of the language of Section 253(b) and the clear policy behind Tenn. Code Ann. § 65-4-201(d) that the TRA interpreted the provisions of Section 253 in such a way as to address its legitimate concern that competition was not legislatively intended to jeopardize universal service during the period of time that permanent universal service mechanisms were being considered in more rural areas of the state. The TRA expressly considered the effect of immediate competition in Tennessee areas where small, independent local exchange carriers and telephone cooperatives serve small areas with relatively few customers, and where such small serving areas include a few large business customers whose revenues support the provision of affordable service to the companies' residential customers. In the judgment of the TRA, the universal service objectives in Tennessee would not be advanced in rural areas by allowing Section 253(a) to force competition into the area that Hyperion seeks to serve. From the TRA's perspective, the goals of federal universal service might likewise be irreparably undermined.

III. TENN. CODE ANN. § 65-4-201(d) OTHERWISE SATISFIES THE REQUIREMENTS OF SECTION 253(b)

As stated in the TRA's April 9, 1998, Order: "If Section 253(b) is interpreted too narrowly, Section 253(b) may be read out of the statute, which is clearly not what Congress intended. It may take some time for the FCC and perhaps the courts to hone the interpretation of Section 253 of the [Act]."⁹ This is especially true with respect to Section 253(b)'s requirement of competitive neutrality. In the judgment of the TRA, Tenn. Code Ann. § 65-4-201(d) is competitively neutral, in part, because its restriction on entry into the service areas of small local exchange companies applies to all telecommunications service providers within the State. No provider is given a competitive advantage over any other in the areas served outside of the small local exchange companies' service territories. Also, Tenn. Code Ann. § 65-4-201(d) allows equal entry by all telecommunications service providers into the territories of a small local exchange company in the event that such small local exchange company seeks and is granted the authority to compete outside of its authorized service area. It is also important to note that the Tennessee General Assembly is required to review the state statute every two (2) years and would have a keen interest in both remedying any negative impact on universal service and ensuring that the benefits of competition are available to all Tennessee consumers.

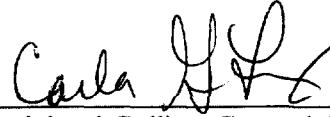
IV. CONCLUSION

For the foregoing reasons, the TRA urges the Commission to affirm the TRA's April 9, 1998, Order denying Hyperion's application for a certificate of public convenience

⁹ The April 9, 1998, Order of the TRA is attached to Hyperion's Petition as Exhibit A.

and necessity to provide service in areas of Tennessee served by Tennessee Telephone Company.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Carla G. Fox", is written over a horizontal line.

J. Richard Collier, General Counsel

Carla G. Fox, Senior Counsel

Tennessee Regulatory Authority

460 James Robertson Pkwy.

Nashville, TN 37243-0505

(615) 741-2904 (Phone)

(615) 741-5015 (Fax)

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of July, 1998, a true and exact copy of the foregoing has been either hand-delivered or delivered via U.S. Mail, postage pre-paid, to the following persons:

Alex Starr, Esq.
Federal Communications Commission
Policy and Program Planning Division
Common Carrier Bureau
1919 M Street, N.W., Room 544
Washington, D.C. 20554

T.G. Pappas, Esq.
R.Dale Grimes, Esq.
Bass, Berry & Sims, PLC
Counsel for Tennessee Telephone. Co.
2700 First American Center
Nashville, TN 37238

Val Sanford, Esq.
Gullet, Sanford, Robinson &
Martin, PLLC
230 Fourth Avenue, North, 3rd Floor
P.O. Box 198888
Nashville, TN 37219-8888

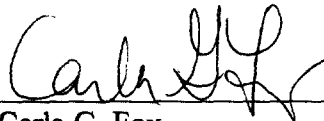
Janet Livengood, Esq.
Director of Regulatory Affairs
AVR, L.P. d/b/a Hyperion of Tenn., L.P.
DDI Plaza Two
500 Thomas Street, Suite 400
Bridgeville, PA 15017

Ms. Kathy M. Harriman
General Manager
AVR, L.P. d/b/a Hyperion of Tenn., L.P.
2001 Hayes Street
Nashville, TN 37203

ITS
1231 20th Street
Washington, DC 20036

K. David Waddell, Esq.
Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Pkwy
Nashville, TN 37219

Chairman Melvin J. Malone
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37219


Carla G. Fox